BEFORE THE INDEPENDENT HEARING PANELS

UNDER	the Resource Management Act 1991
IN THE MATTER	of submissions and further submissions on Greater Wellington Regional Council Proposed Change 1 to the Regional Policy Statement.
Submitter	**WINSTONE AGGREGATES (Submitter 162)**

LEGAL SUBMISSIONS

ON BEHALF OF WINSTONE AGGREGATES

Dated: 3 November 2023

Hearing Stream 5 – Freshwater / Te Mana o te Wai

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1.0 Introduction

1.1 These submissions are made on behalf of Winstone Aggregates (Winstone), a division of Fletcher Concrete and Infrastructure.

1.2 Winstone is a submitter (S162) and a further submitter (FS27) on plan change 1 (PC1) to the Regional Policy Statement.

1.3 The evidence to support Winstone's submission will be given by:

1.3.1 Mr. Phillip Heffernan (corporate);

1.3.2 Mr.Vaughan Smith (ecology); and

1.3.3 Ms. Catherine Clarke (planning).

1.4 Suggested wording changes to the Freshwater Chapter being requested by Winstone as part of its submission are included in **Appendix 1** of Ms Clarke's evidence.

2.0 Outline of submissions

2.1 These legal submissions will provide appropriate legal context to the following issues, they will also refer to 'themes' set out in Winstone's Opening Legal submissions in Hearing Stream 1:

2.1.1 Outline of Winstone's interest in the issues in Hearing Stream 5;

2.1.2 The allocation of provisions in Hearing Stream 5 between the freshwater planning instrument and the Schedule 1 Part 1 instrument;

2.1.3 The scope provided by Winstone's submission;

2.1.4 The role regional policy statements in providing regional context to application of higher order planning instruments;

2.1.5 The need to implement the 2023 update to the National Policy Statement for Freshwater Management (NPS-FM) as part of the current plan change process; and

2.1.6 The definitions of “maintain”, “protect” and “water bodies” and the impact that those definitions have on the policy direction of the PC1’s freshwater chapter provisions.

3.0 Winstone’s interest

3.1 Winstone is the largest quarry operator in the region, with its aggregate quarry located at Belmont in the Hutt Valley, Ashford Park Quarry in Otaki and Petone Sand Plant.

3.2 Winstone is seeking relief to ensure that there is a continued supply of aggregate for the region. Aggregate is essential to infrastructure and construction projects, which are needed as the Wellington region continues to grow.

3.3 The region is facing difficulty as to where aggregate will be sourced because:

3.3.1 Locally sourced quarries have been in rapid decline. Fifty years ago, there were over 30 quarries across the Wellington region, but today there are only a handful;

3.3.2 Aggregate is a finite material, consumed in large quantities to build, maintain and support our communities;

3.3.3 There is no alternative to aggregate as a construction material;

3.3.4 Aggregate is a heavy and bulky product, best utilised as close to where it is sourced as possible to reduce both costs and transport emissions — the economic cost per tonne will approximately double for every addition 30km that aggregate material is transported from source;

3.3.5 Quarries can only be established where accessible and quality aggregate resource lies and where it is near the surface, and where the land has not been sterilised by incompatible land uses.

3.4 The economic significance of quarrying and aggregate supply to the Wellington region is explained further in the evidence of Phil Heffernan and Mike Hensen

3.5 As outlined in general opening submissions on PC1, by their very nature quarrying activities, both aggregate extraction and clean filling of overburden in order to access the aggregate below, inevitably do result in the removal of vegetation and impact freshwater/streams. The aggregate industry operates in an increasingly difficult consenting environment. PC1's focus on protection ignores use and does little to reconcile the region's need for a secure and quality local aggregate supply (there is no alternative).

3.6 The Government recognised the important role of quarrying and cleanfilling activities in both providing for necessary infrastructure and in delivering "well-functioning urban environments" as required by the NPS-UD through its 2023 update to the NPS-FM. The Section 32 evaluation report for the 2023 amendments noted the following in relation to the importance of quarrying and cleanfilling activities[1]:

> *"These sectors are important to provide for needed infrastructure (as well as upgrades) and well-functioning urban environments, which are required under the National Policy Statement on Urban Development 2020[2]."*
>
> *"Aggregate resources are required for the construction of 'specified infrastructure' which already has a consenting pathway in the regulations. Aggregate is locationally constrained, meaning that it can only be sourced from geographic locations where the resource is naturally present. Having a specific pathway provides the ability for this sector to apply for consent, recognising that aggregate resources are necessary to support the construction and maintenance of infrastructure.[3]"*

3.7 Acknowledging this, the 2023 NPS-FM update provides a pathway for the use of land for quarrying and cleanfilling activities where there would otherwise be damage to natural inland wetlands, subject to effects being managed through the effects management hierarchy. Similar pathways for

[1] Ministry for the Environment. 2022. Amendments to the NES-F and NPS-FM: Section 32 report. Wellington: Ministry for the Environment. Accessed via: https://environment.govt.nz/assets/publications/Amendments-to-the-NES-F-and-NPS-FM-Section-32-report.pdf
[2] Paragraph 6 of Page 28
[3] Paragraph 7 of Page 35

aggregate extraction are also provided by the recent national policy statements for highly productive land (NPS-HPL) and indigenous biodiversity (NPS-IB).

3.8 Winstone is seeking relief within PC1 of the RPS to ensure that an appropriate balance is struck between protection of freshwater and wetlands and the use of land for aggregate extraction, and in a manner consistent with the NPS-FM. We note that the policy direction of PC1 appears to be generally aligned with the NPS-FM; for example, Objective 18 is about enabling urban development where it demonstrates the qualities and characteristics of well-functioning urban environments. PC1 needs to be considered in an integrated manner so that such urban development is able to be achieved.

4.0 Allocation of provisions (FPP vs P1S1)

4.1 Winstone explained in its legal submissions for Hearing Stream 1 its concerns that GWRC has incorrectly allocated provisions to the freshwater planning instrument (FPI) when those provisions should be in the Part 1 Schedule 1 (P1S1) instrument.

4.2 The scope of what can lawfully be included in a FPI was addressed by the High Court in *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Inc*.[4] The Court made the following observations as to what amounts to an FPI and is able to proceed through the FPP:

4.2.1 Parts of a regional policy statement will qualify to be part of a FPI if they directly relate to the maintenance or enhancement of the quality or quantity of freshwater.[5]

4.2.2 Part of a regional policy statement may relate to freshwater through giving effect to the NPS-FM, or by otherwise relating to freshwater.

4.2.3 The scope of a FPI is narrower than what is included in the NPS-FM. Not all parts of the NPS-FM relate directly to freshwater quality or quantity, and therefore assessment is needed of whether

[4] *Otago Regional Council v Royal Forest and Bird Protection Society of New Zealand Inc* [2022] NZHC 1777, [2022] NZRMA 565.
[5] At [192].

provisions in a regional policy statement relate to freshwater through the way they give effect to the NPS-FM.[6]

4.2.4 Other provisions that do not give effect to the NPS-FM may relate to freshwater in the required manner to qualify for inclusion in the FPI, by relating directly to matters that impact on the quality and quantity of freshwater, including groundwater, lakes, rivers and wetlands.[7]

4.2.5 Parts of a regional policy statement cannot be included within a FPI simply because of a connection to freshwater through the concepts of Te Mana o te Wai, ki uta ki tai or the integrated management of natural and physical resources.[8]

4.2.6 A provision that is concerned with sea water cannot be considered as related to freshwater or included in a FPI.[9]

4.2.7 The starting point is that all provisions in a proposed RPS should be subject to the normal P1S1 process.[10]

4.3 Winstone is concerned that the Council has allocated provisions to the FPI when they have at most an indirect link to freshwater. An obvious example are policies that cross-refer to other policies that relate to *Te Mana o te Wai*. For those policies, any linkage to freshwater quality and quantity arises only indirectly through the cross-referential link.[11]

4.4 A further example in Hearing Stream 5 is Policy 41. As the s 42A officer's report notes, this gives effect to Objective 29 (soil erosion) as well as Objective 12 (freshwater) and accordingly does not relate directly to freshwater matters.[12] In addition, it is important to bear in mind that any relationship to freshwater by the cross-reference to Objective 12 is at best indirect and not a proper basis for Policy 41 to be included in the FPI.

[6] At [201].
[7] At [202].
[8] At [206].
[9] At [202].
[10] At [203].
[11] For example, Policy 55 of PC1 contains the words "Integrates *Te Mana o te Wai* consistent with Policy 42" as one item within a list of matters to which particular regard shall be given. Winstone considers that the relationship with freshwater quality and quantity only arises indirectly by way of cross-reference to being "consistent with Policy 42".
[12] Section 42A report for Hearing Stream 5, Appendix 3.

4.5 Winstone therefore supports the s 42A officer's recommendations that Policy 15, Policy 41 and Freshwater Objective 12 AER 6 should be moved from the FPI into the standard P1S1 process.

5.0 General Relief – Scope

5.1 Winstone's original submission sought general relief including that:

5.1.1 RPS amendments are updated to accurately reflect the direction sought by the NPS-FM;

5.1.2 The RPS be amended to provide new objectives and policies and methods that provide for mineral extraction related exceptions from the (then draft) NPS-IB;

5.1.3 Specific provisions be made for aggregate and clean filling in PC1.

5.2 The Panels should take a broad approach to the scope for relief afforded by broad submissions of this nature.

5.3 The High Court in *Albany North Landowners v Auckland Council* addressed the relationship between submissions on higher order objectives and policies and lower order recommendations. The Court distinguished between higher order objectives and lower order objectives, policies, methods and rules. It held that changes to lower order provisions could be within scope if they were a reasonably foreseeable logical consequence of a submission on a higher order provision.[13]

5.4 The Court went on to explain that this approach was consistent with the general test for whether proposed relief is within scope. That test is to ask whether the change can fairly be said to be a foreseeable consequence of what is reasonably and fairly raised in submissions on the proposed plan or plan change. A realistic and workable approach must be taken to the scope assessment.[14]

[13] *Albany North Landowners v Auckland Council* [2017] NZHC 138 at [114].
[14] At [115].

5.5 In terms of the relationship between specific and generic submissions, the Court commented that:[15]

> *… It is entirely consistent with this scheme to draw on specific submissions to resolve issues raised by generic submissions on the higher order objectives and policies and/or the other way around in terms of framing the solutions (in the form of methods) to accord with the resolution of issues raised by generic submissions.*

5.6 Winstone therefore submits that the Panels should take a similar approach to the scope afforded by Winstone's general submissions for the RPS to reflect the directions in the NPS-FM (including the 2023 update) as part of the amendments it seeks Chapter 5 of the RPS, as well as to provide specific provisions that recognise the significance of aggregate and clean filling activities on land.

6.0 The role of regional policy statements in the RMA context

6.1 The purpose of a regional policy statement is to achieve the purpose of the Act by providing an overview of resource management issues for the region, and policies and methods to achieve integrated management of the region's resources.[16] In terms of the hierarchy of planning instruments, regional policy statements sit between national policy statements and regional and district plans. The content of the RPS provides policy recognition and guidance when considering a resource consent application and sets the tone for all lower order planning documents, including the recently notified Plan Change 1 to the Natural Resources Plan.

6.2 The Supreme Court's recent decision in *Port Otago* provides helpful guidance to the Panels on the role of a regional policy statement within the hierarchy of planning instruments under the RMA.

6.3 The Court was dealing with a situation where there was potential for conflict between various policies in a higher order instrument, the New Zealand Coastal Policy Statement. The Court said that any conflict

[15] At [149].
[16] Resource Management Act 1991, s 59.

between policies in the NZCPS should be dealt with at the regional policy statement and regional plan level as far as possible. This is so to provide as much information as possible for people to assess whether it is worth applying for resource consent for a particular project, and how a resource consent application would be approached.[17]

6.4 The Court recognised however that the extent to which a regional policy statement (or regional plan) could anticipate conflicts and the means of resolving them would be limited by the amount of information available to the drafters.[18]

6.5 The Court went on to explain that non-specific policies that simply refer to resolving issues by reference to a higher order instrument will not generally be helpful or in accordance with the general scheme of the RMA.[19]

6.6 Winstone submits that this guidance is important and highly relevant here. The Panels should be aiming to ensure that PC1 of the RPS deals with conflicts between policy direction in higher order national policy statements as much as possible on the information before you. This will involve giving regional context and direction to difficult resource management issues. The Panels should seek to ensure the RPS does better than simply referring to higher order instruments without specific elaboration in the regional context.[20]

6.7 This guidance is particularly important in relation to tensions and inconsistencies within the NPS-FM, and between the NPS-FM and other national policy statements. As we now explain, the NPS-FM 2023 update provides clear guidance on the tension between the need for increased housing supply (driven by the NPS-UD) and the protection of freshwater in the specific context of aggregate extraction and cleanfilling activities.

6.8 Chapter 5 has provided unusually prescriptive policies to protect freshwater (for an RPS) but the chapter provides very little guidance in

[17] *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112, [2023] NZRMA 422 at [72].
[18] At [73].
[19] At [85].
[20] Counsel notes that the FPP has limited rights of appeal. If the Panel are minded to address Winstone's concerns expert- conferencing could be directed or further information sought from GWRC to allow the Officers to consider how they may best do that.

terms of use of freshwater resources to provide for the well-being of people and communities.

6.9 The regional policy statement should give clear direction to the way in which corresponding resource management issues, for example protection, is reconciled with the necessary use and how these are to be addressed, providing additional regional context where appropriate and supported by evidence. Focusing on one and ignoring the other is unhelpful, and it over-emphasises protection and creates a policy gap.

7.0 Policy 18 and Policy 40 — quarrying pathway to be included

7.1 Winstone's original submission sought amendments to the RPS so that it provides recognition and protection for significant mineral resources in a manner consistent with the policy framework in the NPS-FW (update) when that document is confirmed (submission points 162.00 and 162.001).[21]

7.2 These submission points have unfortunately been overlooked by the Officer in the s 42A report for this hearing stream.

7.3 A reliable source of locally sourced aggregate is necessary to achieve the development and infrastructure outcomes of the NPS-UD and provide for increased housing supply. The Government recognised in the NPS-FW (February 2023 Update) both the national and regional benefits of quarrying and clean filling activities. The updated NPS-FM sets out a particular pathway for quarrying and cleanfilling activities, which provides an exception to the avoid policy in instances where they conflict with protection of natural inland wetlands.[22]

7.4 The quarrying and cleanfilling pathways were missing from the original NPS-FM released in 2020. The Government saw the omission as something that was significant and needing to be addressed.

7.5 This pathway in the NPS-FW gives national direction to regional councils as to how to manage what can be a problematic interaction. The policy

[21] Include wording from submission for ease of reference.
[22] NPS-FW 2023 update, clause 3.22(1)(d). This was also traversed in more detail in Opening Legal Submissions dated 13 June 2023, paragraph [8]-[13].

rationale for this is because quarrying can only occur where suitable mineral is found, and those sites are now increasingly hard to come by. The Ministry for the Environment described the rationale for updating the NPS-FW to include the quarrying pathway as being to recognise:[23]

7.5.1 Aggregate resources are required for the construction of specified infrastructure, which already has a consent pathway in the regulations; and

7.5.2 The need to provide for increased housing supply.

7.6 The Ministry noted that numerous quarries around New Zealand had been impacted by the restrictions in wetlands. It had been estimated that 15 million tonnes of aggregate and sand supply may be affected, and these are essential resources for building houses and infrastructure.[24]

7.7 Winstone seeks to ensure that the National Policy direction for aggregate extraction and associated clean filling of overburden is recognised as an important (and relevant) component of the regional policy statement by implementing the updated NPS-FM directions. This is appropriate content for a regional policy statement because it involves giving regional context to assist resolving difficult resource management issues that face the Wellington region.

7.8 The aggregate industry has faced considerable difficulty since the introduction of the NPS-FW in 2020. Viable aggregate resource was sterilised over this period, where that resource was in proximity to or affected natural inland wetlands due to unavailability of a consenting pathway. It is important that the regional council implements the directions in the NPS-FM update as a priority.

7.9 The planning evidence from Winstone explains how the quarrying pathway required by the NPS-FM should be implemented in Policy 18 and Policy 40 of the RPS.

7.10 There is no valid reason why the Panels should not recommend the changes proposed by Winstone and its planning experts now in order to

[23] Ministry for the Environment "Managing our wetlands: Policy rationale for exposure draft amendments 2022" (May 2022) at 15.
[24] At 14.

give effect to the NPS-FM directions on quarrying and clean filling. In particular, it would not be appropriate to decline the relief sought on the basis that:

7.10.1 The NPS-FM 2023 update had not been Gazetted at the time that PC1 of the RPS was notified; or

7.10.2 The relief sought by Winstone is out of scope of PC1.

7.11 We address these two potential objections in further detail.

7.12 First, the Council is obliged to prepare PC1 in accordance with all applicable national policy statements.[25] The applicable national policy statements will include such statements (or updates/amendments to statements) that have been Gazetted after PC1 was notified.[26]

7.13 The situation where a national policy statement (or other higher order instrument) comes into effect after a plan change instrument has been notified is not unusual. The general approach that must be taken is to apply the recently notified higher order instrument to the plan change process, subject only to the scope of the plan change and submissions on it.

7.14 A recent example is *Balmoral Developments (Outram) Ltd v Dunedin City Council*. The situation there was that the NPS-HPL had been Gazetted and come into force after notification of the proposed Dunedin City Plan and while appeals were before the Environment Court. The Court noted that the NPS-HPL contained a provision requiring all territorial authorities and consent authorities to apply the NPS-HPL to a certain scope of land. The Court said this meant the NPS-HPL would apply prospectively to matters which the Council or Court are required to make decisions about after the commencement date of the NPS-HPL. As the land that was the subject of appeal was within the scope defined by the NPSHPL, the Court had an obligation to apply the NPS-HPL as part of the appeal process.[27]

7.15 A similar example is *Southern Cross Healthcare Ltd v Auckland Council.* In that case, a private plan change had been notified in 2019 and subject

[25] RMA, s 61(da) and s 55(2B)–(2D).
[26] *West Coast Environmental Network Inc v West Coast Regional Council* [2013] NZEnvC 47 at [32]; *Re Otago Regional Council [2021] NZEnvC 164 at [27] and Annexure 1, [23]; Hawke's Bay Eastern Fish and Game Councils v Hawke's Bay Regional Council* [2014] NZHC 3191, [2015] 2 NZLR 688 at [183].
[27] *Balmoral Developments (Outram) Ltd v Dunedin City Council* [2023] NZEnvC 59 at [93].

to a council decision in May 2020. The NPS-UD then came into force in August 2020 while appeals were before the Environment Court. The Environment Court declined to apply the NPS-UD 2020. The High Court said this was incorrect. Clause 4.1(1) of the NPS-UD required the Council to amend its district plan to give effect to the NPS-UD as soon as practicable, and the Environment Court had the same duty on an appeal. It was practicable, as part of resolving the appeals on the private plan change, for the Court to give effect to the objectives and policies of the NPS-UD. The High Court said it was irrelevant that the Council was engaged in separate and broader plan changes to give effect to the NPS-UD, because those processes did not limit the obligation to give effect to the NPS-UD as part of appeals on the private plan change.[28]

7.16 The NPS-FM contains materially similar provisions to the NPS-UD. It requires the Council (and therefore hearings panels) to give effect to its provisions including the 2023 updated provisions as part of the PC1 process. Notably:

7.16.1 Clause 4.1(1) requires every local authority to give effect to the NPS-FM "as soon as reasonably practicable". This provision is equivalent to the NPS-UD provision that the High Court has held imposed an obligation on councils to implement the NPS-UD as part of plan changes to the extent practicable.[29]

7.16.2 Clause 3.1(1) states that Part 3 of the NPS-FM sets out a "non-exhaustive list of things that local authorities must do to give effect to the objectives and policies … but nothing in this Part limits the general obligation under the Act to give effect to the objective and policies in Part 2 of the NPS-FM". The High Court held that materially similar wording in the NPS-UD did not have the effect of limiting the obligation to give effect to the objectives and policies of the NPS-UD.[30]

7.17 In short, you are required to apply the NPS-FM, including its updated 2023 provisions, as part of the current RPS plan change process. The obligations to give effect to national policy statements under ss 55(2B) and

[28] *Southern Cross Healthcare Ltd v Auckland Council* [2023] NZHC 948 at [85]–[86].
[29] *Southern Cross Healthcare Ltd v Auckland Council* [2023] NZHC 948 at [83].
[30] *Southern Cross Healthcare Ltd v Auckland Council* [2023] NZHC 948 at [86].

62(3), and to prepare the plan change in accordance with national policy statements under s 61(1)(da) apply regardless of the date on which the higher order policy statement was gazetted.

7.18 We turn then to the second point regarding whether there is scope within PC1 to provide the quarrying pathway relief sought by Winstone. In *Re Otago Regional Council,* a decision on direct referred plan change, the Environment Court accepted that the obligation to give effect to a national policy statement would be limited by the scope of the plan change.[31]

7.19 The leading authority on the scope of a plan change is the High Court decision in *Palmerston North City Council v Motor Machinists Ltd*.[32] Whether a submission is within scope requires consideration of two limbs:

7.19.1 Does the submission address the change to the status quo advanced by the proposed plan change?

7.19.2 Is there a real risk that persons potentially affected by the relief sought have been denied an effective opportunity to participate in the plan change process?

7.20 The first limb involves two aspects: the breadth of the alteration to the status quo by the proposed plan change, and whether the submission addresses that alteration. This can be addressed by considering whether the submission raises matters that should have been addressed in the section 32 evaluation report, or whether the management regime for a particular resource is altered by the plan change.

7.21 As part of the second limb, it will be relevant whether the relief sought by the submission is incidental or consequential to the changes in the notified document, or whether it is something "completely novel" or that has "come out of left field".

[31] *Re Otago Regional Council* [2021] NZEnvC 164, Annexure 1 at [23]. See also *Hawke's Bay Eastern Fish and Game Councils v Hawke's Bay Regional Council* [2014] NZHC 3191, [2015] 2 NZLR 688 at [184] where the Court observed that the recently Gazetted policy statement would only be applied to provisions that were within the scope of the appeal.
[32] *Palmerston North City Council v Motor Machinists Ltd* [2013] NZHC 1290, [2014] NZRMA 519.

7.22 Winstone's position is that its submission point, and the relief it seeks by amendments to Policy 18 and Policy 40, are clearly within scope of PC1 for the following reasons:

7.22.1 The Plan Change is seeking to make significant and broad changes to the management regime for a variety of resources. Policy 18 and Policy 40, as notified in PC1, are essentially to be rewritten in a manner responsive to the NPS-FM, with specific wording proposed to protect natural inland wetlands. The relief sought by Winstone addresses and responds to this proposed alteration to the management regimes, in a manner aligned with the NPS-FM update and consistent with an integrated management approach. It has not "come out of left field."

7.22.2 The Plan Change is seeking to give effect to the NPS-FM. The need to implement the NPS-FM was addressed in the section 32 evaluation report.[33] The changes Winstone seeks are incidental or consequential upon implementing the NPS-FM.

7.23 Winstone does not support the alternative approach, which would be to wait for the Council to notify a further specific change to the RPS to give effect to the NPS-FM 2023 update provisions. The Council has both an obligation and scope to do that now as part of the current process. A 'wait and see' approach would mean that the RPS is out of step with higher order instruments for longer than it needs to be and there is a risk that such an approach that over-emphasises protection is adopted into lower order planning documents in the interim. This would cause corresponding uncertainty, risk and cost to the aggregate industry, and the community who rely on aggregate products, in the interim period.

[33] Section 32 evaluation report at [159]–[168].

8.0 Use of terms "maintain" and "protect" — insufficient cost benefit analysis

8.1 We comment in this section on Winstone's proposal for the RPS to use the verbs "maintain" and "protect" in the language of Objective 12 and Policies 18 and 40.[34]

8.2 "Maintain" and "protect" are more consistent with the direction in the NPS-FM and have well established meanings from cases decided by the Environment Court and High Court. By contrast, the "protect and enhance" language proposed in the s 42A report is not supported by a cost-benefit analysis of the high level of restriction that policy direction entails.

8.3 The Environment Court in *Port Otago v Dunedin City Council* discussed the dictionary meaning of the term "maintain", and said:[35]

> ***Maintain*** *… has meanings in The New Oxford Dictionary of English 1998 to 'cause or enable to continue, keep at the same level or rate, and keep in good condition '. The Collins Concise Dictionary Plus 1990 meanings are to 'continue or retain, keep in existence, to keep in proper or good condition '.*

8.4 The drafters of the NPS-FM are to be taken to have had this case law definition in mind when choosing the term "maintained" in Policy 5 of the NPS-FM. Policy 5 includes that "… *the health and well-being of all other water bodies and freshwater ecosystems is maintained …".*

8.5 By contrast, the term "protect" as discussed in case law imposes a more onerous standard. The most relevant authority is the Supreme Court's recent decisions in *Trans-Tasman Resources* and *Port Otago v Environmental Defence Society*.

8.6 The Supreme Court in *Trans-Tasman Resources* held that a direction to "protect" the environment from pollution required the avoidance of material harm. In turn this would require a decision-maker to be satisfied that there will be no material harm, or alternatively that conditions can be imposed that mean (i) material harm will be avoided; (ii) any harm will be mitigated

[34] See evidence of Catherine Clarke at paragraphs 6.5 – 7.5.
[35] *Port Otago Ltd v Dunedin City Council* EnvC Christchurch C4/02, 22 January 2002 at [41]; referred to recently in *The Canyon Vineyard Ltd v Central Otago District Council* at [104].

so that the harm is no longer material; or (iii) any harm will be remedied within a reasonable timeframe so that taking into account the whole period harm subsists, overall the harm is not material.[36]

8.7 Although those comments were in the context of different legislation, the Supreme Court indicated this year in *Port Otago* that the same approach would apply to the interpretation of RMA instruments.[37]

8.8 By using the expressions "protect and enhance", PC1 to the RPS purports to impose a higher standard than that required by Policy 5 of the NPS-FM. There is insufficient basis for this higher standard to be inserted at the regional policy level, especially given that Policies 18 and 40 apply to <u>all</u> water bodies regardless of their significance**,** qualities and values.[38] At present the wording proposed by GWRC confuses the aspects of Policy 5 and 8 of the NPS-FM combining them to adopt the most restrictive parts of each, resulting in a more stringent outcome over and above what is anticipated in the NPS-FM without any justification.

8.9 While Policy 5 of the NSPFM contemplates that the health and well-being of water bodies and freshwater ecosystems may be "improved" where communities choose the improvement option, there is no analysis in the section 32 or section 42A material to support a conclusion that the communities of the Wellington region have chosen a policy that involves protecting and improving "all" water bodies.[39] Nor is there any economic analysis of the costs and trade-offs in requiring improvement in all water bodies as a matter of policy.

8.10 There may be community consensus to improve some significant water bodies, (and NPS-FM Policy 8 does require water bodies with significant values to be protected) but it is a step too far to translate that into a community choice for all water bodies and freshwater ecosystems to be improved and protected.

[36] *Trans-Tasman Resources Ltd v Taranaki-Whanganui Conservation Board* [2021] NZSC 127, [2021] 1 NZLR 801 at [252], [292]–[293] and [309]–[311].
[37] *Port Otago Ltd v Environmental Defence Society Inc* [2023] NZSC 112, [2023] NZRMA 422 at [65]–[66].
[38] RMA, s 2, definition of "water body".
[39] See for example section 42A report for Hearing Stream 5 at [687]–[688].

8.11 In addition, there appears to be an ill-considered use of the italicised defined term “maintain/maintaining” in Policy 40. As Dr Keesing explains in his evidence, this leads to impractical outcomes.

8.12 It is unlikely that the drafters of PC1 intended to use a definition of “maintain” that is directed at there being no reduction in aspects of indigenous ecosystems in the context of Policy 40, because that policy is focussed on protecting/maintaining water bodies such as rivers. It has a different meaning in terms of the NPS-FM and it is not appropriate to read the later NPS-IB definition of ‘maintain’ into the NPS-FM.

8.13 By picking up the definition of “maintain” from the NPS-IB, the drafters of PC1 have also failed to account for clause 1.4(3) of the NPS-IB. That provision requires that in cases of conflict between the NPS-FM and NPS-IB, the NPS-FM shall prevail. This means that you should amend Policy 40 so that the word “maintain” is not referable to an inappropriate defined term.

P D Tancock / D W Ballinger
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Dated the 3rd day of November 2023